IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE.

LETTERS PATENT APPEAL NO. 77 oF 2002
IN

FIRST APPEAL NO. 742 OF 1986

WITH

LETTERS PATENT APPEAL NO. 78 OF 2002.
IN

FIRST APPEAL NO. 762 OF 1986.

Paul Niklav Rodrigues, since
deceased by his heirs:

1A. Lily Lawrence Rodrigues.

1B. Cindrella Clifford Pinto.

1C. Philip Paul Rodrigues,
since deceased by his heirs:
(i) Nancy Philip Rodrigues.
(ii) Mallet Philip Rodrigues.

1D. Milton Blaze Rodrigues.

1E. Bazil Paul Rodrigues.

1F. Dorothy Gasper Pareira.

2. Rita Paul Rodrigues
since deceased by her heirs:
1A to 1F ..APPELLANTS.
All residing at Old Kurla,
Village Ward, Kurla,
Bombay-70.

Versus

Anthony Domnic D'Souza. .. RESPONDENTS.

Mr.A.N. Mulla for the appellants.
Ms. Priyadarshini A. Birje for the respondent.
(in both matters).

CORAM : V.C. DAGA AND
R.S. MOHITE, JJ.

DATE : 23rd September 2004.

ORAL JUDGMENT: (PER MOHITE,J.)

. By these two Letters Patent Appeals, the appellants have impugned the common judgment and order and consequent decrees dated 13.12.2001 passed by a learned Single Judge of this Court in First Appeal No.762 of 1986 and First Appeal No. 742 of 1986. The aforesaid two first appeals arose from the judgment and decrees passed in S.C. Suit No. 6412 of 1989 and S.C. Suit No. 3694 of 1970.

2. Since both the appeals arise from common facts, they are being disposed of by this common judgment and order. The brief facts of the case were as under.

(A) One Manual Soz was the owner of a property bearing Municipal House No. 277 situate at Old Kurla, Bombay-70 (‘suit property’ for short). The said Manual Soz expired in 1900 leaving behind his wife Teresa.

(B) On 25.4.1935, Teresa agreed to sell the suit

property to a third party by name Pawlu Francis for an amount of Rs. 800/- and accepted Rs.300/- as earnest money.

(C) In 1936 Teresa expired. In 1937 Pawlu filed a suit being Reg.Civil Suit No. 143 of 1937 in the Court of Joint Sub-Judge, Thane, for specific performance of the agreement of sale dated 25.4.1935 against the surviving heirs of Teresa i.e. Suzana, Dumming @ Domnic and Francis.

(D) On 9.9.1939, Reg.Civil Suit No. 143 of 1939 was decided against the 3 sole surviving heirs of Teresa i.e. Suzana, Dumming @ Domnic and Francis. The trial Court refused the prayer for specific performance but directed the Defendants Suzana, Dumming @ Domnic and Francis to return the earnest money of Rs. 300/-.

(E) On 16.10.1943, an appeal being Regular Civil Appeal No. 252 of 1939 filed by Pawlu came to be dismissed by the Assistant Judge, Thane, and thus the decree passed by the trial Court in Regular Civil Suit No. 143 of 1937 stood confirmed.

(F) On 10.3.1041, the decree holder- Pawlu filed a Darkhast. The said Darkhast was marked satisfied on

8.8.1945 upon payment of decretal dues to Pawlu.

(G) On 2.10.1945, Suzana, Dumming @ Domnic and Francis executed a registered sale deed transferring the suit property to Mary, the wife of Dumming @ Domnic for a consideration of Rs.700/-. The sale deed recorded an oral agreement between the parties to reconvey the suit property, if the consideration amount of Rs. 700/- was returned back to Mary within a period of one year. However, even after the execution of this sale deed dated 2.10.1945, Suzana her husband Niklav Rodrigues (original defendant No.1 in her suit) and their only surviving son Paul (defendant No.2 in the said suit) were allowed to reside in a part of the suit premises on licence.

(H) Suzana expired in 1951 leaving behind as her heirs her husband Niklav Rodrigues (i.e. Original Defendant No.1 in S.C. Suit No.6412/1969) and her sole surviving son Paul (i.e. Defendant No.2 in S.C. Suit No.6412/1969.)

(I) Dumming @ Domnic expired in 1964 leaving behind him his wife Mary and son Anthony.

(J) On 26.8.1969, Mary issued a notice to the

defendants in L.C. Suit No.6412 of 1969 terminating the licence enjoyed by these defendants.

(K) On 5.9.1969, Mary filed S.C. Suit No. 6412/1969 in the Bombay City Civil Court for a mandatory injunction to remove defendants from the suit premises. It was her case that she had become absolute owner of the suit property by virtue of registered sale deed dated 2.10.1945 executed in her favour by the joint owners of the suit property i.e. Suzana, Dumming @ Domnic and Francis and she sought a declaration that she was the sole owner of the suit property.

(L) On 15.12.1969 the defendants in Suit No. 6142 of 1969 filed a joint written statement. They denied that Mary was the sole owner in respect of the suit property. It was their contention that the sale deed dated 2.10.1945 had been obtained by fraud with an ulterior motive of grabbing the suit property. It was averred in the written statement that Mary and her husband had tempted Suzana and others to give their thumb impressions on certain documents in the office of the Registrar of Documents at Bandra, under the pretext that their thumb impressions were being taken as they were necessary in the appellate proceeding in

Suit No. 143/1937. It was further averred in the said written statement that in any case, the sale deed dated 2.10.1945 was in fact, not a sale deed at all but was a document of mortgage by conditional sale and had been executed to pay off antecedent debts incurred in satisfying decretal dues payable under the Thane Court decree in Reg. Suit No 143/37.

(M) On 29.8.1978, Paul i.e. defendant No..2 in Suit No. 6412/1969 and his wife Rita filed another suit being S.C. Suit No. 3694/1978 against Mary, for a declaration that they along with Mary were the joint owners of the suit property. The written statement of Mary was filed in this suit on 10.7.1979. Her case in her written statement was in accordance with her averments in her plaint in S.C. Suit No. 6412/1969. Pending these two proceedings, in the year 1981, Mary expired and her son Anthony came to be impleaded in the 2 suits in her place.

(N) The said two suits were clubbed together as they involved common questions of facts and law and both the suits were listed on board on 16.6.1986. Advocates for the plaintiff and defendants had filed a list of their documents by this date. Advocates for both the parties admitted certain documents from the

compilation of documents produced by the other side and those documents came to be exhibited as admitted. Prior to exhibiting those documents the trial Court obtained endorsements from the opposing advocates on the list of documents filed in the Court. Thereafter, a joint purshis came to be filed in the trial Court on 16.6.1986, in which original defendant No.2 in Suit No. 6412/1969 and advocate for the plaintiff in the said suit stated that the parties did not desire to lead any oral evidence and that they had submitted their documentary evidence in the 2 suits. The trial Court thereupon made specific endorsements dated 16.6.1986 in the roznamas in the following terms:

> " Plaintiff in Suit No. 6412/69 and defendant No.2 in Suit No. 6412/89 present.
>
> Plaintiff in Suit No. 3694/78 & Defendant in Suit No. 6412/78 present. The parties have filed their respective compilation of docs. The compilation of documents filed by the plaintiff in Suit No.6412/69 admitted by the defts.are marked as Exs.A to Q. The compilation of documents filed by the defendants in Suit No. 3694/78 and admitted by the plaintiff are marked Exs. 1 to 4 Both the parties do not want to lead any oral evidence. They have filed precipe to that effect. At the request of the learned Advocate Mr. A.P. Gupte for defendant in Suit No. 6412/69 both the suits adjourned for arguments to tomorrow, i.e. 17.6.1986 at 2.45 p.m.:

(O) After hearing the arguments, on the basis of the documentary evidence led by the parties, the trial Court disposed of both the suits by a common judgment and order. The trial Court decreed S.C. Suit No. 6412/69 filed by Mary and dismissed S.C.Suit No. 1636/78 filed by Paul and Rita.

(P) Being aggrieved by the judgment and order of the trial Court , original defendant No.2- Paul filed First Appeal No.762/86 impugning the judgment and decree in S.C. No.6412/69 also filed First Appeal No.742/1986 impugning the judgment and decree passed by S.C. No. 3694/78.

(Q) By a common judgment and order dated 13.12.2001, the learned Single Judge of this Court was pleased to dismiss both the appeals by a detailed judgment and order and confirmed the common judgment and order passed by the trial Court. It is against this judgment, order and consequential decrees passed by the learned Single Judge of this Court that the present two Letters Patent Appeals have been filed.

2. The learned Counsel appearing on behalf of the appellants sought to raise several contentions. The contentions raised by him were as under

(A) That S.C. Suit No.6412/69 filed by Mary was time barred and, therefore, the decree passed in the said suit was liable to be set aside.

(B) That Mary and her successor had failed to prove their title and ownership in the suit property on the basis of the sale deed dated 2.10.1945 as they had not discharged the burden of proof cast upon them.

(C) That the trial Court and the learned Single Judge ought to have concluded that the alleged document of sale deed dated 2.10.1945 was in fact a mortgage by conditional sale.

(D) That the trial Court and the learned Single Judge erred in not taking into account the notice issued on behalf of Mary through her Advocate Mr.Rao which had been produced by the defendant on record along with their list of documents and which admitted the joint ownership of the Defendants.

3. On behalf of the Respondents, (Heirs and successors of deceased Mary, these contentions were refuted on the grounds mentioned in the impugned judgments.

4. It is noticed that even before the learned Single Judge all these points were raised, but all except one had been given up. In para 6 of the impugned judgment and order, the learned Single Judge observed that amongst other grounds raised was a ground regarding bar of limitation, absence of cause of action, absence of proof regarding truthfulness of the contents of the documents, error on the part of the trial Court in placing burden of proof regarding issues involved in the matter on the defendants non-maiantainability of the suit filed by the plaintiff and lack of jurisdiction of the civil Court to consider the issue regarding status of the defendants. It was observed that the learned Counsel for the appellant while giving up all these grounds, had restricted the challenge to the document dated 2nd October 1945 i.e. sale deed of the suit property and rejection of claim of the defendant of being co-owners of the suit property.

5. As regards the ground pertaining to S.C. Suit No. 6412/1969 filed by Mary being time barred, we find that this ground was given up before the learned Single Judge. The learned Counsel appearing for the appellant stated that the very fact that this ground

was given up was wrongly recorded and in any case, wrongfully giving up of a ground would not operate as bar for raising the same point in appeal. As regards wrongful recording of the concession made by the Advocate for the appellant before the learned Single Judge, the fact of such wrongful recording cannot be gone into by us in this appeal. The Apex Court has repeatedly held that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by an affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon a party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not open for the party to contend before the superior Court to the contrary. **(See (2003) 6 SCC 573, Central Bank of India vs. Vrajlal Kapurchand Gandhi).**

6. If the appellant was having any grievance about the recording of concession made by the apellant in the judgment, he ought to have approached the learned

Single Judge. This not having been done, in our view, the ground of limitation cannot be pressed in the appeal. Even otherwise, The said ground pertaining to S.C. Suit No. 6412/1969 being filed beyond limitation, is without any merit. The said suit was filed by Mary for a declaration of her ownership and for grant of mandatory injunction to remove the defendants from the suit property. The said suit would be covered by Article 58 read with Article 65 of the Limitation Act, 1963. Under Article 58 which relates to residual declarations, limitation period of 3 years commences when right to sue first accrued. It is well settled that right to sue under Limitation Act is said to have accrued only when there is accrual of right and there is infringement or at least clear and unequivocal threat to infringe that right. **(see AIR 1961 SC 808, C. Mohammad Yunus vs.Syed Unnissa and ors.)** Relief of mandatory injunction against the defendant to remove themselves as claimed by Mary in her aforesaid suit would be governed by Article 65 and in the said suit limitation would begin when possession of the defendant becomes adverse to the plaintiff. In the present case, defendant has not set up a case of adverse possession. Therefore, the period of limitation could not have begun running against the plaintiff in the said suit.

7. As regards the contention that Mary and her successor-Anthony had failed to prove their title to and ownership of the suit property on the basis of the sale deed dated 2.10.1945, as they had not discharged the burden of proof cast upon them, the same was based upon a submission that mere production of the sale deed dated 2.10.1945 would not amount to proving truth of contents thereof. It was contended that the plaintiff Mary had come to the Court basing her suit upon title to the property which rested on the sale deed dated 2.10.1945. Since the defendants had denied the truth of the contents of the sale deed and had contended that the signatures of the vendors had been obtained by fraud and had further contended that in any case, the sale deed was nothing but a conditional mortgage, the burden of proof was cast upon the plaintiff- Mary to prove execution, contents and truth of the sale-deed dated 2.10.1945. Reliance was placed on the judgment of this Court in the case of **Om Prakash Berlia vs. Unit Trust of India (AIR 1983 Bom.1)** wherein this Court observed that sections 61 and 62 read together show that the contents of a document must, primarily, be proved by the production of the document itself for the inspection of the Court. That the truth of the contents of the

document, even prima facie, cannot be proved by merely producing the document for the inspection of the Court. What it states should be so established. The writer of the document is required to depose to the truth of its contents. In our view, the reliance on the aforesaid judgment is misplaced. The case which was cited was not a case where the concerned document was admitted into evidence by consent. In such cases, the law has been laid down by the Apex Court in the case of **P.C. Purshothama vs. S. Perumal, AIR 1972 SC 608** wherein the Apex Court has observed as under:

> "It was next urged that even if the reports in question are admissible we cannot look into contents of those documents. This contention is again unacceptable. Once a document is properly admitted, the contents of that document are also admitted in evidence though those contents may not be conclusive evidence."

In the present case, the defendant not only admitted the sale deed dated 2.10.1945 in evidence by consent, but also did not lead any evidence to prove their case or show that contents thereof were untrue. The defence of the defendants pertaining to the sale deed dated 2.10.1945 is that it was obtained by fraud and thumb impressions were taken on papers on the pretext that they were necessary for appellate proceeding in

Suit No. 143/37. This exfacie appears to be a false defence, for the simple reason that said appellate proceedings were never pending on the date of execution of the document and had already been disposed of on 16.10.1943. It was sought to be argued that such thumb impressions might have been taken on the pretext of filing documents in the Darkhast proceeding. Even this argument also is not acceptable as the Darkhast was also marked satisfied on 8.8.1945, i.e. about 2 months prior to the execution of the sale deed. As rightly observed by the learned Single Judge, the vendor would have known difference between the office of the Registrar and office of a Court and consequently it was difficult to believe that any such document could have been obtained before the Registrar on the pretext that they were required in court proceeding. There is therefore, no substance in the second contention raised by the appellant.

8. As regards the contention that the sale deed dated 2.10.1945 was in fact a mortgage by conditional sale, we find no averment in the written statement about any attempt to refund amount of consideration to Mary within the period of one year which might have given a right to the vendor to obtain a reconveyance. There is no evidence whatsoever led on this point by the

plaintiff. There is thus no substance in this contention also.

9. As regards the fourth contention raised regarding the trial Court not taking into account the notice given by Advocate Shri Rao on behalf of Mary, which document, according to the appellant, admitted their joint ownership, we find no substance in the contention. The record in the case shows that though the said document was produced in the trial Court on behalf of the defendants, the same was not admitted by the plaintiff. It was also not proved by the defendant by leading evidence. Consequently, said document remained unproved and unexhibited. Thus, it cannot be looked into as it does not form part of the evidence.

10. Thus, there is no substance in these appeals. The reasons given by the learned Single Judge are cogent and acceptable. Both the appeals are,therefore, dismissed with no order as to costs.